

NOVA SCOTIA COURT OF APPEAL
Cite as: Neiff Joseph Land Surveyors Ltd. v. Windy Bay Fisheries Ltd.,
1996 NSCA 234

Roscoe, Pugsley and Bateman, JJ.A.

BETWEEN:

NEIFF JOSEPH LAND SURVEYORS LIMITED

Appellant

G.F. Philip Romney
for the Appellant

- and -

WINDY BAY FISHERIES LIMITED, a body
corporate

Respondent

Wayne S. Rideout
for the Respondent

Appeal Heard:
December 6, 1996

Judgment Delivered:
December 6, 1996

THE COURT:

The appeal is dismissed with costs to the respondent in the amount of \$500.00 including disbursements as per oral reasons for judgment of Roscoe, J.A.; Pugsley and Bateman, JJ.A., concurring.

The reasons for judgment of the Court were delivered orally by

ROSCOE, J.A.:

The issue on this appeal is whether a Chambers judge erred in granting leave

to the respondent to issue an execution order against the appellant. The application was made pursuant to **Civil Procedure Rule 52.04** which is as follows:

- (1) A prothonotary shall not issue an execution, receivership or contempt order to enforce an order without first obtaining the leave of the court where,
 - (a) six years or more have elapsed since the date of the order;
 - (b) a change has taken place, whether by death or otherwise, in the parties entitled or liable under the order;
 - (c) any goods sought to be seized under an execution order are in the hands of a receiver appointed by the court;
 - (d) where under the order, any person is entitled to relief subject to the fulfilment of any condition which it is alleged has been fulfilled.

The respondent is the assignee of a judgement against the appellant in the amount of \$4,669.72 dated December 13, 1977. The appellant submits that leave should not have been granted on an **ex parte** application without notice to the appellant, that there should have been an explanation provided respecting the delay in pursuing collection, and that there was insufficient evidence before the Chambers judge regarding the succession of the company that assigned the judgement.

There is no requirement in **Rule 52.04** that notice be given of the application for leave. In Nova Scotia, the practice of making these applications **ex parte** seems to have been established many years ago. See for example: **Rateau v. Ball**, [1914] N.S.R. 448 (N.S.S.C. en banc) and **Kaulback v. Lavender**, [1929] 1 D.L.R. 238 (N.S.S.C.). The English Rule (O.46, r.2) has a similar provision requiring leave of the court to issue a writ of execution where six years has elapsed since the date of the judgement and the practice there is that the application is made to a master **ex parte**. See **Halsbury 1V**, Vol.17, para.

409 and **The Supreme Court Practice**, 1982, Sweet & Maxwell & Stevens & Co., Vol.1, p.776 and **W.T. Lamb & Sons v. Rider**, [1948] 2 K.B. 331.

As stated by this Court in **N.S. Tractors & Equipment Ltd. v. Morton**, [1986] N.S.J. No. 304 (Q.L.), the Chambers judge would have no grounds for refusing to grant leave in the absence of some rule of law barring recovery. Although it may have been preferable for the affidavit in support to have provided more detail respecting the attempts at, or the delay in, enforcement of the judgement, the Chambers judge committed no reviewable error.

The **Rules** do provide three avenues for the Supreme Court to review an execution order granted after a **Rule 52.04** application: **Rule 37.13** which provides for a review of any order granted **ex parte**, and **Rules 52.09** and **53.13** which allow for stays of execution orders. In our view those rules provide appropriate recourse if an execution order is granted in circumstances where its enforcement would be unjust.

The appeal is therefore dismissed with costs to the respondent in the amount of \$500.00 including disbursements.

Roscoe, J.A.

Concurred in:

Pugsley, J.A.

Bateman, J.A.